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No. 95-376

FILED
NOV 2 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNISYS CORPORATION,
Petitioner,
v.
GERALD E. PICKERING, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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1. Respondents argue that there is no reason to hold Unisys' petition pending the Court's decision in *Varity Corp. v. Howe,* 115 S. Ct. 1792 (1995) (No. 94-1471; argued November 1, 1995), because the cases "raise unrelated questions." Opp. 16. A review of the questions presented and the brief of the petitioner in *Varity,* however, shows that Respondents are wrong.

The first question presented in *Varity* (which Respondents have characterized as the "second question" in an apparent attempt to downplay its importance) is *identical* to the first question presented in Unisys' petition — does section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), permit individual plan participants and beneficiaries to sue on their own behalf, and

not on behalf of an ERISA plan, for alleged breaches of fiduciary duty under ERISA? *See* Brief of Petitioner Varity Corporation i. Should the Court resolve this question in favor of the employer in *Varity,* Respondents' breach of fiduciary duty claims in this case will necessarily fail, and this protracted litigation will come to a close. Respondents glibly dismiss this possibility, arguing that it is unlikely that the Court will endorse what Respondents characterize as the "extreme minority view among the circuits." Opp. 20. This Court, however, has chosen to review and decide the issue after full briefing and argument, and it is the Court's decision on the merits that should govern the disposition of the issue in this case as well. Respondents' self-serving prediction of how the Court will decide is no substitute for this Court's actual decision, and it provides no basis for rejecting the present petition while *Varity* is pending.

The second question presented in *Varity,* although not identical to the second question presented by Unisys' petition, does raise issues under ERISA that are directly relevant to Respondents' breach of fiduciary duty claims in this case. First, both cases present what Respondents have described as the "threshold question" (Opp. 16) of whether the employer's conduct was governed by ERISA's fiduciary standards. Although Respondents argue that Unisys has waived its right to raise this issue (Opp. 17), they are wrong. In briefs filed in both courts below, Unisys expressly argued that the conduct on which Respondents based their breach of fiduciary duty claims was not fiduciary in nature. *See* Reply Memorandum of Law in Support of Motion of Defendant Unisys Corporation for Partial Summary Judgment and in Opposition to Plaintiffs' Conditional Motion Pursuant to Fed. R. Civ. P. 56(f) 42-44; Brief of Appellant Unisys Corporation 40-42. Indeed, the district court originally granted Unisys' motion for partial summary judgment, partly on this basis. App. 115a-117a. Similarly, the court of appeals addressed this issue in its decision, making the incredibly broad statement that "[w]hen a corporate plan administrator speaks about benefits to its employees, the administrator acts in a fiduciary capacity even if he speaks about a non-fiduciary decision such as the business decision to

terminate a welfare benefit plan."[1] App. 11a n.10. There can be no question, therefore, that this issue was raised by Unisys below and has not been waived.

Second, both this case and *Varity* involve the issue of the role that a summary plan description plays in satisfying an employer's fiduciary duty of disclosure. In *Varity*, the precise issue is whether the employer's disclosure in a summary plan description of its right to amend or terminate a benefit plan is sufficient to overcome allegedly fraudulent misrepresentations regarding subjects not covered in the summary plan description — the future viability of a new corporate entity into which plan participants were induced to transfer, the new entity's business outlook, and the employer's expectation as to whether its benefit programs would remain unchanged in the future. *See* Brief of Petitioner Varity Corporation 35-42. In the instant case, the issue is whether, despite the summary plan description's disclosure of Unisys' right to amend or terminate its benefit plans, Unisys had a fiduciary duty to advise plan participants of that very right in the context of various informal oral and written communications referring to the "lifetime" duration of retiree medical benefits. *See* Pet. 12-13.

Thus, although the facts in this case and *Varity* are different, the legal issues to be addressed by the Court in *Varity* are closely related to the issues presented by Unisys' petition, and the resolution of those legal issues will dictate whether Respondents can continue to pursue their breach of fiduciary duty claims against Unisys. Given these circumstances, if the Court decides not to hear this case in tandem with *Varity*, the Court should hold Unisys' petition pending its decision in *Varity*.

2. In its petition, Unisys argued that the individual fiduciary duty of disclosure that the courts below imposed on Unisys was inconsistent with the uniform disclosure scheme envisioned by Congress when it enacted ERISA, and was at odds with this Court's decision in *Curtiss-Wright Corp. v. Schoone-*

1. Notably, Respondents did not argue in the court of appeals that Unisys had waived its right to raise this issue.

jongen, 115 S. Ct. 1223 (1995), and similar decisions of several courts of appeals. *See* Pet. 14-17. Respondents argue in response that Unisys "finds no support for its conduct" in these decisions because they did not involve the kind of conduct at issue in this case. Opp. 13-14. Respondents insist that Unisys' conduct should be characterized as "knowing misrepresentations" and that therefore that conduct forms a more acceptable basis for potential liability than would "an employer's passive or unwitting breach of a 'duty to remind' employees about information that has been clearly and adequately disclosed in an SPD." Opp. 13-16.

Labels aside, however, it was Unisys' failure to couple its informal communications to plan participants about "lifetime" benefits with a statement that the plans could be amended or terminated that the courts below held could give rise to a breach of fiduciary duty. Indeed, the district court was specific in its description of what Unisys could have done to satisfy its fiduciary duty of disclosure:

> Defendant could have easily (1) put an explicit ROR [reservation of rights clause] in each informal communication given to employees rather than only use the lifetime language; and (2) when employees made specific inquiries to benefit counselors during exit interviews and at group retirement sessions, the Company could have instructed the counselors to tell prospective retirees that although the word "lifetime" is used, the Company always reserves its right to terminate the plans.

App. 84a.

No matter what label is used to describe Unisys' conduct, therefore, the issue remains the same — did the courts below err in requiring Unisys to reiterate its right to amend or terminate its medical benefit plans in each and every informal communication, exit interview, and group retirement session when that right had concededly been disclosed to employees in an unambiguous summary plan description? In concluding that Unisys may have had such a duty, the courts below imposed a disclosure obligation on employers such as Unisys

that has no basis in the statute or the applicable regulations. Contrary to Respondents' assertions, it is precisely this type of expansive view of an employer's disclosure obligations that this Court rejected in *Curtiss-Wright* and that the courts of appeals refused to embrace in the cases cited in Unisys' petition.

3. In an apparent attempt to downplay the importance of the court of appeals' decision, Respondents have characterized the facts in this case as "unique" and "striking." Opp. 13. A review of the case law, however, reveals that plan participants have repeatedly relied upon informal "misrepresentations" as a vehicle for attempting to obtain benefits to which they were not entitled under the written terms of a plan. These claims often were asserted originally under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), and were uniformly rejected by the courts of appeals as an attempt to informally amend written benefit plans. *See, e.g., Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (rejecting claim for benefits based on oral misrepresentation because courts are "bound by ERISA's emphatic preference for written agreements"); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1264-266 (10th Cir. 1988) (rejecting claim for benefits based on "negligent misrepresentation" claim since end result would be oral modification of plan).

As a result, in recent years plan participants have increasingly relied on breach of fiduciary duty and federal common law estoppel claims as a way of circumventing the written terms of a plan. *See, e.g., Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994) (holding that although plan document unambiguously provided that participant was not entitled to supplemental accidental death and dismemberment coverage, employer's misrepresentations regarding coverage constituted a breach of fiduciary duty and estopped employer from denying coverage to participant). Indeed, it has become standard operating procedure for plan participants to assert three alternative bases for recovery when initiating an action against an employer under ERISA — a claim for violation of the terms of a plan, a claim for breach of fiduciary duty, and a

claim for promissory estoppel. As Respondents themselves acknowledged in the cross-petition they filed in this case:

> Fundamentally, claims like those the Retirees have made, for breach of promise on the one hand, and for misrepresentations (based on breach of fiduciary duty and estoppel) on the other hand, are natural alternatives. Where an employer's representations are considered to define the terms of the contract, the contract claim will be upheld and the misrepresentation claims become superfluous. Where the misrepresentations are held not to define the contract, the contract claim will be rejected but, if the misrepresentations are found to be knowing and material, the alternative misrepresentation claims will be sustained to ensure that the employer is held responsible for the harm it has knowingly caused.

Cross-Pet. at 13.

Contrary to Respondents' assertion, therefore, this case presents a scenario that is hardly unique. A group of plan participants, frustrated by the unambiguous provisions of the summary plan description provided to them by their employer, are simply attempting to circumvent those written plan terms and obtain vested medical benefits based on "misrepresentations," "misunderstandings," and "confusion" regarding the plan's terms. In holding that these claims are viable, the court of appeals has created an environment in which two of the principal tenets of ERISA — the primacy of written plan documents and the corresponding uniformity and certainty regarding a plan participant's benefit entitlement — are seriously threatened.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be heard in tandem with *Varity*.

Respectfully submitted,

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Dated: November 2, 1995